Western New England Law Review

Volume 24 *24 (2002)*
Issue 1

Article 4

1-1-2002

PRESUMED REPRESENTED: ANALYZING INTERVENTION AS OF RIGHT WHEN THE GOVERNMENT IS A PARTY

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INTRODUCTION

Massachusetts law prohibits any firm or person from owning more than three retail liquor stores within the Commonwealth.[1] In response, small retail liquor stores, often family-owned, have joined together and created a trade association to protect their legal interests.[2] Subsequently, a private trade association representing huge, national, multi-outlet food retailers (i.e., Stop & Shop and BJ's) sues the Massachusetts Alcoholic Beverages Control Commission created by the statute for antitrust violations and for the removal of the restriction on the number of liquor licenses that any firm or person can own in Massachusetts.[3] Stop & Shop alone owns ninety-three retail outlets in the Commonwealth but only three liquor licenses.[4] The association of independent retail package stores moves to intervene with the Commission to stop unlimited liquor licenses for chain stores from driving independent stores out of business. While the association's economic interest is sufficient to be considered, the court denies the intervention. The Commission, pledged to uphold the statute "for the better regulation and control of such traffic [of alcoholic beverages] and for the promotion of temperance in use of such beverages,"[5] is deemed to adequately represent the interest of the association. This is an example of private parties seeking to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure with a governmental entity that directly regulates them, but who are unable to do so because the government is presumed to represent them adequately.

Intervention as of right under Rule 24(a)(2) allows an applicant to intervene unless the existing parties in a suit adequately represent the applicant's interests. After the first two requirements

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1. MASS. GEN. LAWS ch. 138, § 15 (1998).
2. *See* Mass. Food Ass'n v. Sullivan, 184 F.R.D. 217, 219 (D. Mass. 1999).
3. *Id.*
4. *Id.*
5. *Id.*

of intervention under Rule 24(a)(2) have been satisfied,[6] intervention hinges on whether the existing representation is adequate. This determination is based on the interests of both the existing governmental party and the proposed intervenor. When should a court presume that a regulating governmental entity adequately represents the interests of those it regulates? Should such a presumption exist?

An inherent conflict exists between the regulator and the regulated due to the divergent nature of their interests. The government, as a regulatory entity, represents the general public good while the regulated intervenor is often representing its individual economic interests. For example, a regulatory agency, such as the Massachusetts Alcoholic Beverages Control Commission, created by statute[7] with commissioners appointed by the governor,[8] defends the statute. The regulated individual businesses, bearing the direct economic impact of any decisions regarding the statute, cannot be parties to the suit unless they are able to intervene.

Some jurisdictions presume the government entity cannot represent private parties adequately because of their regulatory nature, while others presume exactly the opposite. This Note will examine how the opposing presumptions developed, the current state of the law, and how the proposed analytical framework for the courts should be changed. The analytical framework returns the focus of intervention under Rule 24(a)(2) to the actual interests of the government entity and the intervening party and to how these interests relate to each other. In the case outlined above, the intervenors' arguments and the court's analysis would center around how the trade association of independent liquor stores has an economic interest that is direct and meaningful enough to warrant a consideration separate and distinct from the general public interest the Commission represents. The new framework suggested in this Note reorients the analysis to the particular interests of the parties involved, shifting it away from preliminary presumptions based on the nature of the parties.

Part I of this Note discusses Rule 24(a)(2) of the Federal Rules of Civil Procedure, Supreme Court decisions interpreting this Rule, and the historical development of standards among the federal cir-

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6. FED. R. CIV. P. 24(a)(2) (claiming "an interest relating to the property or transaction . . . [and] that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest . . . .").

7. MASS. GEN. LAWS ch. 138, § 15 (1998).

8. *Mass. Food Ass'n*, 184 F.R.D. at 222.

cuits. Part II discusses the current circuit split.[9] Finally, Part III analyzes the intended purpose of intervention as of right under Rule 24(a)(2), discusses reasons for the difference in standards, and proposes a new analytical framework that incorporates and unites the divergent standards.

I. HISTORY

The Federal Rules of Civil Procedure allow two kinds of intervention for entities that are involved in, but not already made a party to a lawsuit.[10] Rule 24 of the Federal Rules of Civil Procedure permits intervention as of right[11] and permissive intervention.[12] The two are often pleaded together to allow intervenors to gain entry into the suit either as of right or, failing that, by the court's discretion.[13]

A. *The Rule and Its Amendments*

Rule 24 of the Federal Rules of Civil Procedure was initially adopted in 1937.[14] The original Rule 24(a)(2) allowed intervention as of right for a party who could be bound by the judgment when the existing representation is or may be inadequate.[15] In 1966, the Supreme Court[16] amended the Rule to address some disparities

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9. Maine v. Dir. U.S. Fish & Wildlife Serv., 262 F.3d 13 (1st Cir. 2001) (presumption); Utah Ass'n of Counties v. Clinton, 255 F.3d 1246 (10th Cir. 2001) (presumption only when same ultimate objective); Stupak-Thrall v. Glickman, 226 F.3d 467 (6th Cir. 2000) (no presumption); Clark v. Putnam County, 168 F.3d 458 (11th Cir. 1999) (weak presumption for same ultimate objective); Kleissler v. U.S. Forest Serv., 157 F.3d 964 (3d Cir. 1998) (presumption); Sierra Club v. Glickman, 82 F.3d 106 (5th Cir. 1996) (no presumption); Mausolf v. Babbitt, 85 F.3d 1295 (8th Cir. 1996) (presumption); Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489 (9th Cir. 1995) (presumption); Dimond v. Dist. of Columbia, 792 F.2d 179 (D.C. 1986) (no presumption).

10. FED. R. CIV. P. 24; *see also* FED. R. CIV. P. 19 (Joinder of Persons Needed for Just Adjudication); FED. R. CIV. P. 20 (Permissive Joinder of Parties); FED. R. CIV. P. 23 (Class Actions).

11. FED. R. CIV. P. 24(a).

12. FED. R. CIV. P. 24(b) ("Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.").

13. This Note will only address a particular instance of intervention as of right—when a regulated entity is trying to intervene with its regulator.

14. FED. R. CIV. P. 24.

15. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 401 (1967).

16. *See* 28 U.S.C. § 2073(b) (2000) (The Committee on Rules of Practice and Procedure).

that had developed after its inception.[17] The amended Rule 24(a)(2) defines intervention as of right as allowing parties to intervene:

> When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.[18]

The Advisory Committee intended the Rule to be liberally construed; a party whose ability to protect its interest would be affected by the disposition of the matter should be able to represent the interest without a presumption against it.[19] Indeed, the applicant is usually the best judge of whether its interests are being represented adequately, particularly since it would assume the costs of participating in the litigation as a party.[20]

1. Amendment to Rule 24(a)

Analysis of Rule 24 must incorporate both the historical significance of the kinds of lawsuits in which intervention has been attempted and the amendment of the original Rule.[21] The Supreme Court created the original Rule 24(a)[22] to allow intervention where a non-party could be bound under res judicata to the resolution of the suit, provided that the existing parties were not adequately representing the non-party's interests.[23] Since the non-party's interest was critical and there was no adequate alternative, the intervention was as of right and gave the intervenor full status as a party.[24]

Following the adoption of the original Rule 24, some courts

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17. The original Rule 24(a)(3) needed to be extended and the "binding" part removed, so the subdivision (a)(2) was changed to reflect when an applicant qualified for intervention. The adequate representation requirement remained since it could be decided in the character and at the time of the litigation. Kaplan, *supra* note 15, at 403. The 1966 amendments changed the wording of the rule from "when" the representation "is or may be" inadequate to "unless" the interest "is" adequately represented and moved the clause to the end of the sentence. 26 FED. PROC. § 59:300 (2001).

18. FED. R. CIV. P. 24(a)(2).

19. 7C CHARLES WRIGHT ET AL., FED. PRAC. & PROC. CIV. 2D § 1909 (1986).

20. *Id.*

21. John E. Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 331 (1969).

22. *See* 28 U.S.C. §§ 2071-2074 (2000).

23. Kennedy, *supra* note 21, at 333.

24. *Id.* at 334.

interpreted the Rule to allow in parties who would be practically affected but who did not qualify for intervention under the Rule's criteria.[25] Other courts did not allow intervention when they thought it best to conclude the litigation without intervenor interference.[26]

The restriction of res judicata was the primary criticism of Rule 24(a); a party had to be bound by the lawsuit's resolution to intervene.[27] The criticism emerged in part from cases of class actions or trusts where the extent to which parties were bound by the action was hard to determine.[28] In response, the Supreme Court amended the Rule in 1966 and changed the wording from "is or may be bound by a judgment in the action"[29] to "disposition of the action may as a practical matter impair or impede his ability to protect [his] interest . . . ."[30] In conjunction, the Supreme Court amended Federal Rules 19 and 23 to clarify, respectively, the persons needed for just adjudication and class actions.[31] The amendments expanded the right to intervene and, although creating potentially more complex litigation, furthered judicial administration through the consolidation of separate lawsuits.[32]

The 1966 amendments to Rule 24(a)(2) also rephrased the requirement of adequate representation. Before 1966, the Rule read "when the representation of the applicant's interest by existing parties is or may be inadequate . . . ."[33] The amendments modified it to read "unless the applicant's interest is adequately represented by existing parties,"[34] and moved the phrase to the end of the sentence. Previously, the intervenor had to show that the representation at least might be inadequate; after the amendment, the Rule states that intervention, assuming the requisite factors have been met, is allowed only if the court is persuaded that the representation of existing parties is in fact inadequate.[35]

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25. *Id.*; *see* Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960) (interpreting the standing requirement broadly to allow in intervenors).

26. Kennedy, *supra* note 21, at 336; *see* Sam Fox Publ'g Co. v. United States, 366 U.S. 683 (1961) (espousing the restricted intervention).

27. Kennedy, *supra* note 21, at 336.

28. JOHN J. COUND ET AL., 1998 CIVIL PROCEDURE SUPPLEMENT 76-77 (1998).

29. Kennedy, *supra* note 21, at 334.

30. *Id.* at 337.

31. David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 729 (1968).

32. Kennedy, *supra* note 21, at 343.

33. *Id.* at 333-34.

34. *Id.* at 337.

35. *Id.*

According to the Advisory Committee's notes, the general purpose of the previous Rule 24(a)(2) was to allow a party to intervene if there was a "fair probability that the representation was inadequate."[36] Since the intervenor bears the burden of proving inadequacy and is the best judge of determining whether the representation is inadequate, the court may apply the standard liberally in favor of allowing intervention.[37] The amended Rule requires that the intervenor show, as its final requirement, the higher standard that the existing representation is inadequate leaving only a short step to the further presumption that a government entity adequately represents them. On the other hand, some courts have opposed the higher standard when government entities are involved because the presumption does not exist in the wording of Rule 24(a)(2).[38] Thus, the seeds for the later circuit split were sown.

B. *Supreme Court Interpretation*

The Supreme Court leniently interpreted the requirement of inadequacy of representation for Rule 24(a)(2) in *Trbovich v. United Mine Workers*.[39] In *Trbovich*, the Secretary of Labor brought an action to set aside a union election and a union member sought to intervene as of right.[40] The Court found that the proposed intervenor satisfied the Rule if it showed that existing representation "may be" inadequate.[41] The burden to make that showing was minimal.[42] The dual roles of the Secretary of Labor mirrored the two interests that a governmental entity represents, public and private.[43]

These dual roles illustrate the dichotomy that a governmental entity and an intervening, regulated party face. A government party must protect its own interests in addition to the interests of those it is charged with representing, and they may not be precisely

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36. COUND, *supra* note 28, at 76.

37. Kennedy, *supra* note 21, at 354; *see* Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967) ("While the change in wording does not relate to any change in standard as such, it underscores both the burden on those opposing intervention to show the adequacy of the representation and the need for a liberal application in favor of permitting intervention.").

38. *See* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135 (1967); Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 298 (1999).

39. Trbovich v. United Mine Workers, 404 U.S. 528, 538 (1972).

40. *Id.* at 529-30.

41. *Id.* at 538.

42. *Id.* at 539.

43. *Id.* at 538-39.

the same interests. In *Trbovich*, the Secretary had a duty to represent individual union members as their lawyer in actions against their union. Yet, his public duty to assure democratic elections is broader than the interest of an individual union member.[44] Because the functions were different, they did not require the same approach in litigation. Therefore, the Secretary would not be adequately representing the union members, and the Court allowed intervention as of right under Rule 24(a).[45]

After *Trbovich*, the Supreme Court again ruled on intervention, this time sustaining the denial of an intervention motion because it was untimely.[46] The State of New York brought a suit against the United States seeking a judgment that some counties' voting qualifications did not fall under the Voting Rights Act of 1965 and were, therefore, not suspended.[47] The United States responded that it was without sufficient knowledge to determine whether literacy tests were administered discriminatorily.[48] New York moved for summary judgment and the United States consented to declaratory judgment; whereupon, the NAACP filed its motion to intervene.

The Court ruled that the motion was not timely[49] and only mentioned adequate representation to note that the claim of inadequate representation had not been unsubstantiated.[50] However, the dissent in *NAACP v. New York* felt that the motion was timely and that the issue of adequate representation was key.[51] While "[i]t is assumed, of course, that the United States adequately represents the public interest in cases of this sort," the United States, in this case, clearly was not adequately representing the public interest because it was not contesting the suit.[52] For this reason, intervention should have been allowed,[53] despite the assumption that the United

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44. *Id.*

45. *Id.* at 539.

46. NAACP v. New York, 413 U.S. 345 (1973).

47. *Id.* at 348-49.

48. *Id.* at 349.

49. Timeliness is a preliminary requirement for Rule 24(a)(2) before adequate representation is judged. FED. R. CIV. P. 24(a)(2).

50. *NAACP*, 413 U.S. at 368.

51. *Id.* at 374 (Douglas, J., dissenting).

52. *Id.* at 372 (Douglas, J., dissenting).

53. *Id.* (Douglas, J., dissenting); Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135 (1967) ("[W]here the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.") (citing Missouri-Kansas Pipe

States should adequately represent the public in a clear example of sovereign protection.[54]

More recently, the Supreme Court mentioned intervention as of right in a proceeding Nebraska brought against Wyoming and Colorado regarding a 1945 decree rationing water from the North Platte River among the three states.[55] The United States, also a party, raised the issue that individual water storage contractors could try to intervene in the instant proceedings.[56] The Court stated that the states are presumed to speak for the interests of their citizens and individual intervenors would be denied without a showing of "some compelling interest in [their] own right, apart from [their interests] in a class with all other citizens and creatures of the state" where the interest was not properly represented already.[57]

Based on the concept of state sovereign power, the presumption was ordinarily applied to suits by one state against another in a suit under the original jurisdiction of the Supreme Court.[58] The presumption was used to prevent the opening of litigation to individually represent all state citizens; however, an individual with a distinct interest separable from the general public should still be able to participate in the part of the litigation pertaining to that interest.[59] The development of a presumption in favor of state's

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Line Co. v. United States, 312 U.S. 502, 506 (1941)). *But see Cascade Natural Gas*, 386 U.S. at 149 (Stewart, J., dissenting) ("A fortiori, intervention is improper when a private party appears in order to vindicate his theory of *public* interest in an action brought by the Government.").

54. *NAACP*, 413 U.S. at 370 (Douglas, J., dissenting) ("The Voting Rights Act Amendments of 1970 were specifically aimed at New York . . . .").

55. Nebraska v. Wyoming, 515 U.S. 1, 1 (1995).

56. *Id.* at 21.

57. *Id.* at 21-22 (citations omitted).

58. Kentucky v. Indiana, 281 U.S. 163, 173 (1930) ("A state suing, or sued, in this Court, by virtue of the original jurisdiction over controversies between States, must be deemed to represent all its citizens . . . . Citizens . . . of either State, without a showing of any further . . . interest, have no separate individual right to contest . . . the [state's] position . . . ."); *see also* New Jersey v. New York, 345 U.S. 369, 373 (1953) ("An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right . . . ."). *But cf.* Arizona v. California, 460 U.S. 605, 614 (1983) (permitting permissive intervention for Indian Tribes over water rights even though the States argued that the United States already adequately represented the tribes because the tribes at least met the criteria for permissive intervention and they would be bound by any judgment in the suit).

59. *Kentucky*, 281 U.S. at 173-74 ("This gives an individual defendant in such a suit between States full opportunity to litigate the only question which concerns him individually as distinguished from the questions which concern him only in common with all the citizens of his State.").

representation, in state suits within the Supreme Court, is not at odds with the liberal standard of *Trbovich* because it is clearly in an area of sovereign interest, such as water rights, and the potential intervenor has an opportunity to show how its interests may differ from the public interest.

C. *Shift in Burden*

The courts do not agree on whether the amended version of the Rule represents a shift in burden. Some have taken the 1966 change to suggest a shift in burden, requiring those opposing intervention to show adequate representation.[60] Others have rejected this assumption, implicitly or explicitly, in keeping with *Trbovich*, which stated that the burden is with the applicant but should be treated as minimal.[61] Still others remain unsure whether the 1966 amendments created a burden shift.[62]

D. *Standard for Adequate Representation*

After *Trbovich*, in cases where the existing party was a government entity, the courts' interpretations of the adequate representation standard began to diverge. Some circuits adopted and built on the idea that a government entity should be presumed to represent adequately a non-party that it is responsible for or regulates. The presumption is inconsistent with *Trbovich* because *Trbovich* only requires that the applicant shows that the representation "may be" inadequate and the burden of making that showing is minimal.[63] The Court specifically rejected the presumption that the inter-

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60. WRIGHT, *supra* note 19, at 314-23; Smuck v. Hobson, 408 F.2d 175, 181 (D.C. Cir. 1980) ("As the conditional wording of Rule 24(a)(2) suggests by permitting intervention 'unless the applicant's interest is adequately represented by existing parties, the burden (is) on those opposing intervention to show the adequacy of the existing representation.'") (citing Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967)); Shapiro, *supra* note 31, at 741 n.91 ("The intervener's load seems to have been lightened by a language change in the rule which may shift the burden on this issue to those opposing intervention."); *cf.* Kennedy, *supra* note 21, at 353-54.

61. *See* Trbovich v. United Mine Workers, 404 U.S. 528, 538 (1972); Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 133-34 (1967); Blake v. Pallan, 554 F.2d 947, 954 (9th Cir. 1977) (stating that most courts have not adopted the burden shift).

62. 26 FED. PROC. § 59:300 (1999); *see* Peterson v. United States, 41 F.R.D. 131, 133 (D.C. Minn. 1966) (noting that plausible arguments exist for both sides of the controversy and listing factors that should be considered, including the general policy of liberalizing the Rule, who is in a better position to bear the burden, and the new wording of the Rule).

63. Trbovich v. United Mine Workers, 404 U.S. 528, 538 (1972).

venor's interest must be considered adequately represented unless the Secretary has failed to perform his duties.[64] Other appellate courts have decided that the inherent conflict between a government entity and those it regulates or controls prohibited such a presumption and allowed intervention more liberally.

The decisions, building on earlier decisions, developed in three stages. The first stage was an almost per se intervention because the interests are inherently different. The second stage began to presume that government representation was adequate but the intervenors had a minimal burden to show that they had different interests and therefore were not adequately represented. The third stage continued the presumption favoring government representation but raised the burden of rebuttal, requiring intervenors to show actual inadequate representation. Some circuits continue to use the earlier rationale that the interests are inherently dissimilar enough to make the representation inadequate, creating the current circuit split.

1. Development of Reasoning

a. First Stage: Per Se Intervention

Soon after *Trbovich*, the Tenth Circuit ruled on the amended Rule 24(a)(2) in a case challenging the constitutionality of statutes governing the Interstate Commerce Commission in which common carriers were trying to intervene.[65] The court determined that the petitioners must show that the representation "may be" inadequate, but the burden was slight.[66] The conflict between the petitioners' private interests and the government-protected public interest satisfied the burden.[67] The government's representation of both of these interests at once would be "a task which is on its face impossible."[68] The *Trbovich* standard, with a minimal burden, is overcome with a general but fundamental difference of interests integral to the nature of the parties.[69]

In 1986, the Circuit for the District of Columbia examined in

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64. *Id.*

65. Nat'l Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381, 382 (10th Cir. 1977).

66. *Id.* at 383.

67. *Id.* (stating briefly that the government agency is seeking to protect the public interest and the private interest of the intervenors).

68. *Id.*

69. *See id.* at 384 (deciding that the respective interests represent the *kind* of conflict that satisfies the minimal burden).

more depth the inherent conflict between public and private interests. In *Dimond v. District of Columbia*,[70] an automobile accident victim had brought a claim challenging the District of Columbia's no-fault insurance law.[71] State Farm, as the insurer, sought to intervene because it expected a savings from the statutory limitations on payments for non-economic losses.[72] The court stated that the burden to show adequate representation is on the intervenor but is not "onerous," and the representation does not have to be in fact inadequate.[73]

A government entity must represent the public interests of all its citizens, but the District of Columbia did not have a financial interest in the insurance law.[74] State Farm's more narrow and "parochial" financial interest could not be subsumed into the shared interests of all the citizens, and representation of both was a potential conflict of interest enough to satisfy the minimal burden because it would require different legal arguments.[75] The same "impossible task"[76] of representing both public and private financial interests exists, but the reasoning extends to show the general conflict through the resulting legal arguments in order to overcome the minimal burden.

In *Conservation Law Foundation of New England, Inc. v. Mosbacher*,[77] the First Circuit analyzed the issue when a public interest organization brought a suit against the Secretary of Commerce to protect certain fish from stock depletion through over-fishing.[78] Regulated commercial fishing groups were seeking to intervene since the agreement would introduce more stringent rules for the amount and type of catches.[79] The court found that the Secretary's representation must be driven by his or her view of public welfare,

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70. 792 F.2d 179 (D.C. Cir. 1986).

71. *Id.* at 183.

72. *Id.* at 192.

73. *Id.*

74. *Id.* at 193.

75. *Id.*; *see, e.g.*, Natural Res. Def. Council v. Costle, 561 F.2d 904, 912 (D.C. Cir. 1977) (overcoming minimal burden when parties have different scopes to their interests such that their interests "may not coincide" because the intervenor has a more economic interest than the government).

76. *See Dimond*, 792 F.2d at 193 ("Thus, the District government would face a potential conflict of interest were it to represent both the general interests of its citizens and the financial interests of State Farm.") (citing Nat'l Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381, 383-84 (10th Cir. 1977) ("impossible task")).

77. 966 F.2d 39 (1st Cir. 1992).

78. *Id.* at 44.

79. *Id.*

which may stand in opposition to the personal, economic interests of the commercial fishermen.[80]

The court noted that the Secretary's acceptance of the entire relief sought without filing an answer to the complaint indicated that the narrower interest of the intervenors was not being adequately represented.[81] Regulatory agencies and regulated industries can have different scopes of interest in a settlement agreement, even if they agree that the regulations should be lawful.[82] The court reiterated the "impossible task" conflict when an agency is seeking to protect both public interest and the private interest of the intervenor.[83] Consequently, the Secretary was unlikely to, and perhaps never could, represent the fishing groups' interests adequately.[84] Stated summarily, the parties have interests differing in scope, and because the government may find itself in a conflict of interest, the minimal burden is satisfied.

b. Second Stage: Minimal Burden to Rebut Adequate Representation

Subsequent cases have eroded the standard established in *Trbovich* that the representation only "may be" inadequate by presuming that existing representation by government parties was adequate. An example presuming government representation to be adequate occurred in *Forest Conservation Council v. United States Forest Service*.[85]

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80. *Id.* The example given by the Court of the fisherman's interest was paying off the mortgage on a boat requiring maximum catches even if the long-term effect was to deplete permanently the whole fishing stock. *Id.*

81. *Id.*; *see* Moosehead Sanitary Dist. v. S.G. Phillips Corp., 610 F.2d 49, 54-55 (1st Cir. 1979) (indicating that if intervenors presented evidence of the government party "sleeping on their oars," it could be sufficient to show inadequacy); Sanguine, Ltd. v. U.S. Dep't of the Interior, 736 F.2d 1416, 1419 (10th Cir. 1984) (finding that failure to file responsive pleading or brief, call any witnesses, or make any arguments against plaintiff's motion was sufficient to show the minimal burden for inadequate representation).

82. *Conservation Law Found.*, 966 F.2d at 44 (citing the reasoning in Natural Res. Def. Council v. Costle, 561 F.2d 904, 912 (D.C. Cir. 1977)).

83. *Id.* at 44-45 (referencing the conflict between private and public interests from Nat'l Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381, 384 (10th Cir. 1977)).

84. *Id.*; *see* Nat'l Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381, 384 (10th Cir. 1977) (undertaking a "task which is on its face impossible" when an agency tries to protect both the public interest and interest of private intervenor); *see also* New York Pub. Interest Research Group v. Regents of Univ. of N.Y., 516 F.2d 350, 351-52 (2d Cir. 1975).

85. 66 F.3d 1489, 1498-99 (9th Cir. 1995) (using the wording "may be" inadequate but employing a presumption in favor of the government).

In *Forest Conservation Council*, the Ninth Circuit used a presumption of adequate representation when the existing party was a government body charged with representing the intervenors' interests and required a minimum showing to overcome the presumption.[86] The Forest Conservation Council, in order to force compliance with the National Environmental Policy Act and the National Forest Management Act, sought an injunction prohibiting the sale of timber from a wildlife habitat.[87] The State of Arizona tried to intervene, in part because it received money from timber sales in the national forests.[88]

The court in *Forest Conservation Council*, within the context of presuming adequate representation, considered whether the government would "undoubtedly make all the intervenor's arguments; whether [it] is capable and willing to make such arguments; and whether the intervenor would offer any necessary elements to the proceedings that other parties would neglect."[89] The United States Forest Service was charged with representing the broad public interest, not just Arizona's "narrow, parochial interests."[90] In fact, the Forest Service was not charged with a duty to represent Arizona's asserted interests because its view was necessarily broader.[91] The difference in scope of interests satisfied the minimal showing to overcome the presumption of adequate representation.[92] While the standard included a presumption favoring government representation, the general difference in scope between public and private interests was enough to overcome the minimal showing and Arizona was able to intervene.[93]

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86. *Id.* at 1499 (citing Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3d Cir. 1976); *see also* WRIGHT, *supra* note 19, at 324.

87. *Forest Conservation Council*, 66 F.3d at 1499.

88. *Id.* at 1492.

89. *Id.* at 1498-99. The court also rejected the claim that amicus curiae status is sufficient to protect the intervenor's interests by allowing them to express their arguments, because it would not give them legal means to challenge the injunction on their own behalf. *Id.* at 1498.

90. *Id.*; *see* Sierra Club v. Espy, 18 F.3d 1202, 1208 (5th Cir. 1994) (economic concerns); Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 1000-01 (8th Cir. 1993) (narrower local interests); Conservation Law Found. v. Mosbacher, 966 F.2d 39, 44-45 (1st Cir. 1992) (personal interest not subsumed into public); Natural Res. Def. Council v. Costle, 561 F.2d 904, 912 (D.C. Cir. 1977) (personal not public interest); *see also* 3B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 24.07[4] (2d ed. 1995) ("Inadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public.").

91. *Forest Conservation Council*, 66 F.3d at 1499.

92. *Id.*

93. *Id.*

The court in *Mausolf v. Babbitt*[94] more fully defined and expanded the presumption for government representation. The Eighth Circuit acknowledged that a minimal showing easily satisfied Rule 24(a)(2)'s last criterion except when the party was a government entity and the matter was one of sovereign interest.[95] In that circumstance, the court presumed that the government adequately represented the interests of all its citizens.[96] The presumption hinges on whether the government is acting as parens patriae.[97]

Underlying the rationale for a presumption of adequate representation is the role of the government as parens patriae,[98] the "trustee, guardian, or representative of all her citizens."[99] The courts later expanded this concept to cover cases in which the governmental entity represented "quasi-sovereign"[100] interests because they assumed that the government deserved special consideration.[101]

Under the parens patriae concept, the courts presumed adequate representation by the government of the citizens' interests in any suit involving a matter of sovereign interest.[102] To overcome the presumption of adequacy, the intervenor had to provide more than a minimal showing; instead, it had to demonstrate that the interest was in fact different and unrepresented.[103] "[T]he govern-

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94. 85 F.3d 1295 (8th Cir. 1996).

95. *Id.* at 1303.

96. *Id.*

97. *Id.*; BLACK'S LAW DICTIONARY 769 (6th ed. abr. 1991) ("It is the principle that the state must care for those who cannot take care of themselves . . . . [A] concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc.").

98. *See* United States v. Chamberlin, 219 U.S. 250, 261 (1911) ("The rule . . . has been applied frequently in the different states, and practically in the Federal courts . . . . [S]o much of the royal prerogatives as belonged to the King in his capacity of parens patriae, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution.").

99. United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 984 (2d Cir. 1984) (citations omitted). The government had brought suit against chemical and plastics corporations about a landfill in violation of the Clean Water Act and environmental groups were trying to intervene. *Id.* at 972-73. The court found that if a government entity was representing the interests in its parens patriae capacity, the intervenor had to demonstrate a compelling, not properly represented interest distinguishable from its interest in the class of all citizens of the state. *Id.* at 984 (citations omitted).

100. *Id.*

101. *Id.*

102. *Id.* at 985.

103. *Id.* The court chose not to adopt a "presumption" of adequate representation by the sovereign in a parens patriae capacity, despite its references to such a presumption in other cases, but it did determine that a greater showing of inadequacy was required. The instant applicants for intervention did not show any conflicting roles, like

ment's exclusive control over the course of its litigation" would not be improperly disrupted if a higher standard for showing inadequate representation was used.[104]

Mausolf involved snowmobilers who, trying to enjoin restrictions on snowmobiling in a national park, brought a suit against the Secretary of the Department of the Interior.[105] Conservation groups were seeking to intervene to protect the wildlife environment in the park and prevent injury to their members through the snowmobiles' environmental destruction.[106] The government was responsible for protecting the conservation concerns as parens patriae, so the higher standard applied.[107] However, the intervenors had to rebut the presumption with a "strong showing" that the intervenors' interests were not subsumed within the general public interest.[108] The presumption does not derive from *Trbovich*, indeed *Mausolf* does not mention *Trbovich* at all.[109]

To rebut the presumption, the conservation groups showed

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that of the Secretary in *Trbovich*, and the "mere existence of disagreement over some aspects" of the resolution does not prove that the government, as parens patriae, was inadequately representing the parties. *Id.* at 987. The court also stated that it would be going too far to require a showing of collusion, a standard that develops later, and settled on a "strong affirmative showing that the sovereign is not fairly representing the interests of the applicant." *Id.* at 985.

104. *Id.* at 987.

105. *Mausolf*, 85 F.3d at 1296.

106. *Id.* Alleged injuries to the members were based on the fact that several members planned to visit the park on a consistent basis and they would have been injured directly if the snowmobilers' activities in the park were left unrestricted. *Id.* at 1301.

107. *Id.* at 1303. The instant case is distinguished from *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1001 (8th Cir. 1993), an earlier Eighth Circuit decision, where the court determined that the state was only protecting the counties' interests if those interests were subsumed into the general public interests the government had to protect, otherwise the state was not acting in its sovereign capacity. In a departure from past precedent, the court decided that they were narrower interests and not subsumed, so the parens patriae doctrine did not apply.

108. *Mausolf*, 85 F.3d at 1303 (citing United States v. Union Elec. Co., 64 F.3d 1152, 1169 (8th Cir. 1995)); *Mille Lacs*, 989 F.2d at 1000. *Mille Lacs* derived the presumption rule from a previous case about racial discrimination in hiring practices. Pennsylvania v. Rizzo, 530 F.2d 501, 502 (3d Cir. 1976) ("[A] presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee.") (citing 7A CHARLES WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909, 528-29 (1972)); *see* Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961) (dictum) ("[S]ound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree . . . in the absence of any claim of bad faith or malfeasance on the part of the Government . . . .").

109. *Mausolf*, 85 F.3d at 1295.

that the government must represent all of its citizens and the park was designed to benefit those citizens differently.[110] To avoid the "tragedy of the commons" for public lands,[111] the government had to favor certain uses over others.[112] The recreational and conservationist uses would inevitably conflict, and the government could not adequately represent conflicting interests at the same time.[113]

The recreational uses of the public and the conservationist uses may be adverse to one another even though both fall within the government's protection.[114] The conflict in interests would preclude the government from adequately representing the intervenors because, "when the proposed intervenors' concern is not a matter of 'sovereign interest,' there is no reason to think the government will represent it."[115] The standard for adequate representation became more restricted, no longer the minimal burden of *Trbovich*, to include a presumption under the parens patriae doctrine if the government was acting in its sovereign capacity.[116] A strong showing can overcome the higher standard, such as when the intervenor's interest could not be subsumed into the general interest.[117]

The Third Circuit used the higher standard to presume adequate government representation in *Kleissler v. United States Forest Service*.[118] State residents and an environmental organization brought suit against the Forest Service for violating statutory requirements when it permitted substantial logging in the Allegheny

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110. *Id.* at 1303.

111. The "tragedy of the commons" is an economic concept in which the government must put some uses, those benefiting the public welfare, above others to protect "the commons." *See id.* The tragedy occurs when the public overuses public resources because individuals are not paying the full cost of the consumption. G.S. Rasmussen & Assocs. v. Kalitta Flying Serv., Inc., 958 F.2d 896, 900 (9th Cir. 1992). The government has to step in, using its sovereign powers, to protect common resources. But the government's interest in protecting these resources from overuse or depletion may not coincide with the intervenor's interest; indeed, they may be in conflict. *See* Sierra Club v. Glickman, 82 F.3d 106, 110 (5th Cir. 1996) (per curiam) (representing the public interest does not necessarily include the intervenor's narrower interest); Conservation Law Found. v. Mosbacher, 966 F.2d 39, 44-45 (1st Cir. 1992) (representing the public interest may prevent the government from also advancing the narrower interest of a private entity); *see also* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (introducing the economic theory and coining the phrase).

112. *Mausolf*, 85 F.3d at 1303.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. 157 F.3d 964, 967 (3d Cir. 1998).

National Forest.[119] Logging companies tried to join in the intervention motion that area school districts with financial interests in the logging industry filed.[120] The Third Circuit noted that it supported the more flexible interpretation of Rule 24, rather than the historically rigid interpretation,[121] but merely having an economic interest was not decisive enough to allow intervention automatically.[122]

The court used a more complicated standard. A government entity charged by law with maintaining a national policy is presumed able to represent an intervenor adequately, particularly when the interests of the intervenor "closely parallel those of the public agency."[123] The burden to overcome the presumption requires a strong showing of inadequate representation.[124] However, when the agency's views, centered on the public welfare, differ from the personal parochial views of the intervenor, the burden is lighter.[125] Indeed, the burden supposedly varies according to the facts of the case.[126]

Kleissler defined the "polestar for evaluating a claim for intervention is always whether the proposed intervenor's interest is direct or remote."[127] To maintain efficient litigation while retaining flexibility for Rule 24, the intervenor should have a specific defined interest that the relief sought would directly affect.[128] While the intervenor's economic interest would not change, the government policy could, and the economic interest could become lost in government policy.[129] In *Kleissler*, the private party intervenors had a

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119. *Id.*

120. *Id.* at 968.

121. *See* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 133-34 (1967); Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994) (allowing two timber companies to intervene but only where their interests were sufficient to satisfy Rule 24(a) because they had existing timber contracts).

122. *Kleissler*, 157 F.3d at 970.

123. *Id.* at 972 (citing Brody v. Spang, 957 F.2d 1108, 1123 (3d Cir. 1992)).

124. *Id.* (deriving the "strong showing" language from Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996)).

125. *Id.*; *see* Conservation Law Found. v. Mosbacher, 966 F.2d 39, 44 (1st Cir. 1992) (ruling that intervention is allowed because the governmental entity's judgment is "necessarily constrained by his view of the public welfare" and the intervenors may "see their own interest in a different, perhaps more parochial light"); *Mausolf*, 85 F.3d at 1303 (stating when not to apply parens patriae presumption because "when a proposed intervenors' concern is not a matter of 'sovereign interest,' there is no reason to think the government will represent it").

126. *Kleissler*, 157 F.3d at 972.

127. *Id.*

128. *Id.*

129. *Id.* at 973-74.

direct, rather than remote, interest that the government did not adequately represent; therefore, the court allowed intervention.[130] *Kleissler* is a pivotal case because it shows how the presumption depends on the nature of the interests, how the burden changes depending on the interests, and orients its ruling on whether the interests are direct or remote.

c. *Third Stage: Requiring that the Intervenor Show Inadequate Representation*

The courts, using the presumption developed in the preceding cases, continued to define the burden an intervenor must satisfy to overcome the presumption. Raising the bar ever higher against intervention, this standard required an actual conflict or tangible basis for a difference in interest, not just a theoretical one.

The First Circuit defined adequate representation in two sections in *Daggett v. Commission on Government Ethics and Election Practices*.[131] First, adequate representation is presumed if the applicant's and existing party's goals are the same.[132] Second, the representation is presumed to be adequate when it is the government defending the validity of a statute.[133]

In *Daggett*, current office holders and prospective candidates sought to intervene in a suit brought by other candidates against the Commission to challenge the Maine Clean Election Act.[134] They tried to overcome the burden in two ways, showing an actual conflict of interest and showing the use of different legal arguments.[135]

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130. *Id.*

131. 172 F.3d 104, 111 (1st Cir. 1999). Directly before this decision, the First Circuit decided *Pub. Serv. Co. v. Patch*, 136 F.3d 197 (1st Cir. 1998), where the court asserted that the criterion for adequate representation "is more than a paper tiger." *Id.* at 207. While the interests of the intervenor were defined as narrower and economic, the court stated that the burden of persuasion for the claim is increased because the representative party is a governmental entity, acting in a governmental capacity, so there is a presumption of adequacy requiring a "strong affirmative showing" to rebut. *Id.* (citations omitted).

The court decided that the representation was adequate because the intervenors failed to show a legal argument that was antipathetic to the intervenors' goals. *Id.* at 208. The intervenors attempted to have the court infer the possibility of an adverse defense because of the implied difference in interest, but the court declined to do so. *Id.* The court wanted a strong showing of actual, contradictory, legal arguments that would make the ultimate objectives conflict. *Id.*

132. *Daggett*, 172 F.3d at 111.

133. *Id.*

134. *Id.* at 108.

135. *Id.* at 112.

Actions that the representing party has taken[136] or can be reasonably predicted to take[137] can show actual conflict of interest resulting in inadequate representation. Abstractly representing a "broader" interest does not rebut the presumption.[138] However, if the Attorney General decided not to appeal, the court could re-examine intervention as of right on the grounds of conflict of interest.[139]

Although not an actual conflict of interest, the legal arguments may differ despite having the same ultimate goal of defending the Act.[140] The court found that differing arguments do not create inadequate representation per se, but could become extreme enough, such as a refusal to present obvious arguments, to warrant finding inadequate representation even if no actual conflict of interests existed.[141] Despite the fact that the Attorney General had submitted a memorandum identifying differences in approach between the parties and supporting the intervention, the intervenors failed to show that the Attorney General had refused to present their arguments and that an amicus brief was insufficient.[142]

The court established a standard allowing either actual conflict of interest or extremely divergent legal arguments to overcome the presumption of adequate representation if proven with strong evidence.[143] Otherwise, the intervenors can use amicus briefs or, according to the court, take up the issue again upon the existing parties' failure to appeal.[144]

The First Circuit again ruled on intervention as of right soon afterward and, since the court read "interest" under Rule 24(a)(2)

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136. *Id.* (referencing *Mosbacher* where the representing party had already acquiesced to the consent decree the intervenor was trying to fight); *see* Conservation Law Found. v. Mosbacher, 966 F.2d 39, 44 (1st Cir. 1992).

137. *Id.*; *see also* Dimond v. Dist. of Columbia, 792 F.2d 179, 192-93 (D.C. Cir. 1986).

138. *Daggett*, 172 F.3d at 112; *see* Pub. Serv. Co. v. Patch, 136 F.3d 197, 207-08 (1st Cir. 1998).

139. *Daggett*, 172 F.3d at 112; *cf.* Meek v. Metro. Dade County, 985 F.2d 1471, 1478 (11th Cir. 1993).

140. *Daggett*, 172 F.3d at 112.

141. *Id.*; *see* Stadin v. Union Elec. Co., 309 F.2d 912, 919 (8th Cir. 1962); *cf.* Grutter v. Bollinger, 188 F.3d 394, 400 (6th Cir. 1999) ("It may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments.") (citations omitted).

142. *Daggett*, 172 F.3d at 112.

143. *Id.*

144. *Id.*; *cf. Meek*, 985 F.2d at 1478 n.2 ("We do not now hold that one who has an interest in ongoing litigation in which a public body is adequately representing that interest may simply wait until judgment is entered and intervene on appeal simply because the public body decides not to appeal . . . .").

more broadly, interpreted the adequacy of representation as a more restricted standard.[145] In *Massachusetts Food Association v. Massachusetts Alcoholic Beverages Control Commission*,[146] supermarket chains brought an action under the Sherman Act[147] against the Massachusetts Alcoholic Beverages Control Commission to stop enforcement of a Massachusetts statute limiting the number of retail liquor stores a single entity could own.[148] Trade associations, representing retail liquor stores, sought to intervene.[149]

While applying the presumption that the government defendant adequately represented the interests of the private parties, the court rejected outright the argument that, whenever the government is the regulator of the party seeking to intervene, the court should apply a per se rule that the government's representation is inadequate.[150] The court also dispensed with the theory that the intervenor's different legal arguments could satisfy the burden of showing inadequate representation.[151]

Instead, the court stated that intervenors could present these arguments in amicus curiae briefs.[152] The court did note that amicus briefs would not be adequate when the intervenors have information that could only be included if they are participating as parties.[153] Amicus briefs could also advise the Supreme Court of missing arguments in the event the Commonwealth won and the Massachusetts Food Association sought certiorari.[154] The standard has evolved to the point where there is a presumption in favor of existing government parties, a showing is necessary to overcome the presumption, and other legal arguments are not enough to satisfy the burden because those can be presented as amicus.

The standard for intervention consists of a burden that the intervenor must prove unless the party was a governmental entity act-

145. Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560, 566-67 (1st Cir. 1999) (stating "[b]ut perhaps as a counterweight to the broad reading of 'interest,' the courts have been quite ready to presume [adequate representation] unless there is a showing to the contrary").

146. *Id.*

147. 15 U.S.C. § 1 (2000) (restraint of illegal trade).

148. *Mass. Food Ass'n*, 197 F.3d at 562-63.

149. *Id.*

150. *Id.* at 567.

151. *Id.*

152. *Id.*

153. *Id.* (citing Daggett v. Comm'n on Gov't Ethics and Election Practices, 172 F.3d 104, 112 (1st Cir. 1999)).

154. *Id.* at 568.

ing in a sovereign capacity.[155] If so, the court applies a presumption of adequate representation and the intervenor has to make a stronger showing of inadequate representation.[156] An intervenor could rebut the presumption by showing that the overall interests represented by the Government contained conflicting interests, including the narrower one of the intervenor that was not subsumed in the general public interest.

II. CIRCUIT SPLIT

The current circuit split arose from the development of different burdens after the 1966 amendments to Rule 24 and the Supreme Court decision in *Trbovich*[157] in 1972. There are two forces at work here. The first is that the government is a sovereign power over its people and able to represent them in matters of public concern. The second is that some individual concerns within the spectrum of the public welfare are specific to the individual, or even adverse to the general interest, and not subsumed within the public nature of the government representation.

The dichotomy between the two forces is most clear when the suit involves the government as a regulator, trying to uphold a statute regulating some aspect of public welfare, and the intervenor is a business entity regulated by the statute yet with distinct economic concerns that could easily differ from the public intent of the statute. The circuit split developed in a general sense because the courts were focusing on one of the forces as more crucial than the other. Either the government as sovereign was most important, or the individual entity had a separate concern and the government could not possibly represent them both adequately, in other words, per se inadequate representation.

A. *Per Se Inadequate Representation*

Rule 24(a)(2) allows intervention as of right when an intervenor meets the first two criteria,[158] unless existing parties already

155. *See, e.g.*, Kleissler v. U.S. Forest Serv., 157 F.3d 964, 972 (3d Cir. 1998) ("The burden of establishing inadequacy of representation by existing parties varies with each case . . . . A strong showing of inadequate representation [is necessary to overcome the presumption].").

156. *See, e.g.*, Mass. Food Ass'n v. Mass. Alcoholic Bev. Control Comm'n, 197 F.3d 560, 567 (1st Cir. 1999) (using a standard of "showing" but finding that other legal arguments and direct economic effect were not enough of a showing).

157. *See supra* notes 39-45 and accompanying text.

158. FED. R. CIV. P. 24(a)(2).

adequately represent the intervenor.[159] The burden to show inadequate representation is minimal, as defined by the Supreme Court in *Trbovich*.[160] When the existing party is a government entity that regulates the proposed intervenor, some circuits allow the intervention virtually per se because it is impossible for the government to represent adequately the specific interests of those it regulates as it represents the general public interest.

Specifically addressing the circumstance where regulating entities had inherently different interests than the parties they regulated, the Sixth Circuit decided that representation was inadequate in *Linton v. Commissioner of Health and Environment*.[161] In *Linton*, nursing homes tried to intervene in a suit filed against the Tennessee Commissioner of Health and Environment.[162] The Sixth Circuit decided that, because the Tennessee Department of Health and Environment acted as both regulator and purchaser of the intervenor's services, "inherent inconsistencies" were created between the intervenor's interests and those of the State, thereby resulting in inadequate representation.[163] In its brief discussion of this facet of intervention, the court did not derive its ruling from other decisions involving inadequate representation.[164] Rather, it viewed the situation as so inherently conflicting that there was no need to further define the interests.[165]

In *Stupak-Thrall v. Glickman*,[166] the Sixth Circuit reasserted its position that no higher standard for adequate representation exists for government entities who are parties to the suit.[167] Lakeshore property owners had challenged the Forest Service's authority to regulate the wilderness area surrounding Crooked Lake in Michigan, which included specifically banning the use of boats.[168] Environmental groups and other lakeshore owners sought to intervene.[169] The district court applied the parens patriae doctrine and raised the bar on intervention through the presumption of ade-

159. *See supra* Part I.

160. Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972); *see supra* notes 28-36 and accompanying text.

161. 973 F.2d 1311, 1319-20 (6th Cir. 1992).

162. *Id.* at 1313.

163. *Id.*

164. *Id.* at 1319-20 (citing only to *Trbovich*).

165. *Id.*

166. 226 F.3d 467 (6th Cir. 2000).

167. *Id.* at 479.

168. *Id.* at 469-70.

169. *Id.* at 470-71.

quate representation by a government entity acting in a sovereign capacity.[170]

The Sixth Circuit had just rejected this doctrine,[171] but the district court had already entered final judgment in the instant case.[172] The court of appeals concluded that the intervention was not timely and did not allow intervention.[173] The court, however, reasserted that it would not apply the parens patriae doctrine.[174]

The dissent in *Stupak-Thrall* disagreed with the majority's interpretation of the district court opinion on whether timeliness was the deciding factor.[175] Instead, the dissent found that the decision rested on the district court's erroneous use of the parens patriae doctrine in determining whether adequate representation existed.[176] In the absence of the parens patriae doctrine, the intervention should be allowed under a lenient standard,[177] as established in *Trbovich*. Indeed, the intervenor is the best judge of whether the governmental entities can adequately represent its interests, and any uncertainty regarding the inadequacy of the representation should be resolved in favor of the intervenor.[178]

While both parties shared the same ultimate goal of preserving the wilderness, the interests of the government and the Wilderness Association were likely to diverge, particularly since the Wilderness Association had advocated stricter restrictions than the government.[179] The actual conflict revolved around whether the government had the right to include Crooked Lake within the designated wilderness area and, in this matter, the interests were largely identical.[180] Wilderness Association argued that its interests could diverge later, however, if the parties entered into settlement negotiations.[181] Without using a presumption in the government's

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170. *Id.* at 479 (citing Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996) to define the parens patriae doctrine that the Sixth Circuit declined to follow).

171. Grutter v. Bollinger, 188 F.3d 394, 400 (6th Cir. 1999) ("However, this circuit has declined to endorse a higher standard for inadequacy when a governmental entity is involved.").

172. *Stupak-Thrall*, 226 F.3d at 479.

173. *Id.*

174. *Id.*

175. *Id.* at 480 (Moore, J., dissenting).

176. *Id.* at 482 (Moore, J., dissenting).

177. *Id.* (Moore, J., dissenting).

178. *Id.* (Moore, J., dissenting); *see also* 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 24.03[4][a] (3d ed. 2000).

179. *Stupak-Thrall*, 226 F.3d at 482 (Moore, J., dissenting).

180. *Id.*

181. *Id.* at 482 (Moore, J., dissenting).

favor, the dissent would have granted intervention because the interests, while identical now, had a real possibility of diverging at some point in the future over settlement issues, and that was enough to satisfy the minimal standard.[182]

The Tenth Circuit recently addressed the difference between the government and the intervenor having the same ultimate objectives as opposed to having the same interests.[183] Counties in Utah had filed suit to prevent the creation of a national monument, decreed by President Clinton, that would prevent a proposed underground coal mine at the site.[184] Environmental groups were seeking to intervene to protect the public lands and environment.[185] The Tenth Circuit had used a liberal standard for intervention as of right since *National Farm Lines*[186] whereby the minimal showing is easily met when the existing party was the government.[187] Even if the objectives were identical, if the intervenor had expertise that the government did not have, or had a private interest whereas the government must represent the public interest, the government's representation would not be adequate.[188]

Although a presumption against intervention was used when the objectives were the same,[189] the court found that the presumption was rebutted if the public interest represented by the government could differ from the private one asserted by the intervenor.[190] The court clarified the distinction that the objectives,

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182. *Id.* (Moore, J., dissenting).

183. Utah Ass'n of Counties v. Clinton, 255 F.3d 1246 (10th Cir. 2001).

184. *Id.* at 1248.

185. *Id.* at 1249.

186. *Id.*; Nat'l Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381, 384 (10th Cir. 1977). Previously, the Tenth Circuit used a minimal burden that could be overcome by showing either collusion between the government and opposing party, that the government had an adverse interest, or that the government was actually failing to fulfill its duty to represent the intervenor's interest. But a presumption of adequacy was appropriate when the objectives were identical. However, the objectives were not identical if the interests were public and private because to represent both was an impossible task. Coalition of Ariz./N.M. Counties v. Dep't of Interior, 100 F.3d 837, 844-45 (10th Cir. 1996) (citing *Nat'l Farm Lines*, 564 F.2d at 384).

187. *Utah Ass'n*, 255 F.3d at 1254-55.

188. *Id.* at 1255.

189. *Id.*; *see* Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996).

190. *Utah Ass'n*, 255 F.3d at 1255 (citing Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996) (managing public lands means that the government must favor some interests to avoid the "tragedy of the commons"); Sierra Club v. Glickman, 82 F.3d 106, 110 (5th Cir. 1996) (per curiam) (showing inadequate representation even if objective was the same because the public interest would not necessarily coincide with the private interest); Conservation Law Found. v. Mosbacher, 966 F.2d 39, 44-45 (1st Cir. 1992)

or posture in litigation, were not the same thing as the interests.[191] Hence, while the government and the intervenor could share objectives, the distinct interests asserted, whether private or public, could create a potential conflict that rendered the representation inadequate.

B. *Presumption of Adequate Representation*

Since the Supreme Court decision in *Trbovich*,[192] some circuits have moved to increase the obstacles to intervention, particularly in cases where a governmental entity is the party already representing the interests.[193] In part, the development occurred to maintain judicial economy and simplicity.[194] These courts have been reluctant to treat less concrete differences in interests as legitimate. Although all of the cases derive from Rule 24(a)(2), which does not specify a higher standard, some circuits have raised the bar to presume adequate representation, particularly if the government party is charged with representing the interests of the intervenor as a member of the public or as a regulated industry.

A district court in the Third Circuit recently addressed the issue and illuminated the distinction in the presumption of adequate representation when the interests are not identical.[195] Cloverland-Green Spring Dairies brought suit against the Pennsylvania Milk Marketing Board challenging the Milk Marketing Law and the minimum wholesale milk prices set by the board, which they claimed made it impossible for them to sell milk in Pennsylvania.[196] Since the minimum prices set by the Board affected their profits, the Pennsylvania Association of Milk Dealers filed to intervene.[197] The Board was interested in defending the constitutionality of the law; a government party is presumed to provide adequate representation when it is charged by law to uphold a national policy.[198] However,

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(representing the intervenor's private interests violates the government's duty to represent the public); *In re* Sierra Club, 945 F.2d 776, 779-80 (4th Cir. 1991) (representing public interest conflicts with private interests even if objectives are the same).

191. *Utah Ass'n*, 255 F.3d at 1255-56.

192. *See supra* notes 39-45 and accompanying text.

193. *See supra* notes 129-154 and accompanying text.

194. Kennedy, *supra* note 21, at 377-78 (indicating that impact on "fair and efficient administration of justice" is an important factor to consider when allowing intervention).

195. Cloverland-Green Spring Dairies v. Pa. Milk Mktg. Bd., 138 F. Supp. 2d 593, 601 (M.D. Pa. 2001).

196. *Id.* at 598.

197. *Id.* at 601.

198. *Id.* (citing Kleissler v. U.S. Forest Serv., 157 F.3d 964, 972 (3d Cir. 1998)).

"this presumption is not as substantial when the . . . interests are not identical."[199]

Because the intervenor's and the government's interests overlapped, the court found that a presumption existed for adequate representation by the government.[200] The intervenor had an economic interest in having the law upheld, while the government had a public interest.[201] Yet, both would vigorously argue for the continued viability of the law, so the presumption not only applied but was also proven true in the course of the litigation.[202] Although the applicable standard was not annunciated, the court denied intervention as of right since the intervenor failed to demonstrate inadequate representation and, therefore, failed to meet the burden to rebut the presumption.[203]

The First Circuit discussed at length the circumstances in which the presumption occurs and the circuit's history of cases dealing with it.[204] In an environmental dispute, the State of Maine and business groups sued the National Marine Fisheries Service regarding a decision designating atlantic salmon in certain areas of Maine as an endangered species.[205] Several conservation groups tried to intervene on the side of the United States to defend the designation.[206] In earlier litigation, the conservation groups had brought suit against the service to force protection of the salmon; they now argued that the United States could not adequately represent their interests.[207]

The court stated that "some burden" is placed on the intervenors to show inadequacy and that there was a "general alignment of interests."[208] The court distinguished the instant case from *Trbovich* because there were not "two distinct interests" between individuals and the general public that the same government entity was

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199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* (citing neither the standard in Trbovich v. United Mine Workers, 404 U.S. 528 (1972) nor any others for what the strength of the burden was).

204. Maine v. U.S. Fish & Wildlife Serv., 262 F.3d 13, 17 (1st Cir. 2001).

205. *Id.* at 14.

206. *Id.*

207. *Id.*

208. *Id.* at 17-18 (citing Daggett v. Comm'n on Gov't Ethics & Election Practices, 172 F.3d 104, 111 (1st Cir. 1999) without indicating whether the burden was of production or of persuasion).

trying to represent.[209] Several decisions in the First Circuit followed the same paradigm: "a group with recognized interests wishes to intervene and defend an action of the government which the government is itself defending."[210]

The court's holding was based upon the following analysis. The government is presumed to provide adequate representation if its interest is aligned with the intervenor's.[211] However, "presumption" is not intended to do more than require an explanation of why the assumed adequate representation is less than adequate, in view of the overall litigation.[212] Specifically, a mere difference in tactics does not rebut the presumption.[213] The court found a distinction, however, between the instant case and other cases within the circuit that had allowed intervention.[214] In those cases, the intervenors had direct private interests that the government had no interest in protecting.[215] While the parties in the instant case stated similar interests, and merely evidenced a tactical disagreement, the test for inadequacy could be differentiated depending on the nature of the interests.[216] As in *Massachusetts Food Association v. Massachusetts Alcoholic Beverage Control Commission*,[217] the court considered the intervenors' specific arguments, in lieu of intervention, to be represented through its "amicus-plus" status.[218]

Immediately thereafter, a district court in Massachusetts applied *Maine v. United States Fish and Wildlife Service* to an intervention motion.[219] The Massachusetts Commissioner of Insurance,

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209. *Id.* at 19 (quoting Trbovich v. United Mine Workers, 404 U.S. 528, 538-39 (1972)).

210. *Id.*; *see* Cotter v. Mass. Ass'n of Minority Law Enforcement Officers, 219 F.3d 31 (1st Cir. 2000) (seeking to intervene to defend promotions of minority officers); Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560 (1st Cir. 1999), *cert. denied*, 529 U.S. 1105 (2000); *Daggett*, 172 F.3d at 104; Public Serv. Co. v. Patch, 136 F.3d 197 (1st Cir. 1998).

211. *Maine*, 262 F.3d at 19.

212. *Id.*

213. *Id.*

214. *Id.* at 20.

215. *Id.* (citing *Cotter*, 219 F.3d at 34 (promotion of minority police officers); Conservation Law Found. v. Mosbacher, 966 F.2d 39 (1st Cir. 1992) (commercial fishermen)).

216. *Id.*

217. 197 F.3d 560, 568 (1st Cir. 1999).

218. *Maine*, 262 F.3d at 19. "Amicus-plus" status, as defined by the district court, gave the proposed intervenors the right to submit briefs for arguments not submitted by the government, a limited right to call and cross-examine witnesses, and to receive notice of documents as if they were parties. *Id.* at 14.

219. Ruthardt v. United States, 164 F. Supp. 2d 232 (D. Mass. 2001).

as receiver of two insolvent insurance companies, sought a declaratory judgment regarding priority of claims under a Massachusetts statute.[220] Insurance guaranty funds moved to intervene to protect their priority status over claims of the United States during liquidation of the insurance companies.[221] The funds were seeking essentially the same declaration as the government party.[222]

The district court held that under the First Circuit's standard, the four elements of Rule 24(a)(2) are "read not discretely, but together, and always in keeping with a commonsense view of the overall litigation."[223] Although the showing is only minimal, it must include a "tangible basis" supporting the inadequacy of representation.[224] The court did not use the presumption wording, but rather "ratchet[ed] up" the burden of persuasion when the government was currently acting to defend a public act and the private party also attempted to intervene in defense.[225]

The First Circuit identified some factors that could call into question the adequacy of the governmental defense, particularly regarding the introduction of private interests in a regulatory context.[226] The funds were not engaged in a previously adversarial relationship with the government defendant, and the interests of both did not presently diverge to a significant degree.[227] Despite noting that the government has a "less personal economic interest," the court reasoned that the government had a well-developed defense and was "ready, willing, and able to vigorously defend" the statute.[228] The intervenors had not shown that there was an argument or evidence that was excluded without them as parties, and they were included as amici; therefore, intervention was unnecessary.[229]

The court used a higher burden of persuasion, rather than a presumption of adequate representation, when the government was the existing party and the interests aligned themselves. Although referring to the burden in *Trbovich*, the court also cited the presumption from *Public Service Company of New Hampshire v.*

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220. *Id.* at 234.
221. *Id.* at 234-36.
222. *Id.* at 245.
223. *Id.* at 245 (citing Pub. Serv. Co. v. Patch, 136 F.3d 197, 204 (1st Cir. 1998)).
224. *Id.* at 246.
225. *Id.* (citing *Maine*, 262 F.3d at 18-20).
226. *Id.*
227. *Id.*
228. *Id.* at 247.
229. *Id.*

Patch, demonstrating the divergent sources of the contradictory standards.[230] Under this higher standard, a mere difference of tactics, or the general difference between economic concerns and public concerns is not enough to satisfy the intervenor's burden.

When deciding whether Rule 24(a)(2) would allow intervention as of right, the courts have produced a spectrum of standards based on a variety of analytical frameworks. Due to the inconsistency created through application of this spectrum of standards, the courts could benefit from a more uniform standard that incorporates the Rule, the legal history, and the interests of the court, the parties, and the intervenor. This Note turns next to such an integration.

III. LEGAL ANALYSIS

The different relationships that can exist between the government and the intervenor have fostered an array of tests for adequate representation when the government is already a party. Is the problem whether the existing party is a government entity regulating the intervenor and, therefore, responsible for its interests? Is it whether the interests themselves differ sufficiently to require that the intervenor represent its own interests? Or is it that these two conditions cannot coexist, as when the existing party is a governmental entity regulating the intervenor, and it cannot per se adequately represent the intervenor's interests?

Upon examination of the courts' focuses and assumptions, an analytical framework emerges that incorporates the difference, or implied difference, in interests as well as fidelity to Rule 24(a)(2). The framework does not include a presumption that applies whenever the existing party is governmental. Instead, it is based on defining the interests, determining whether differences, if any, exist, and deciding how those differences affect the standard the court should use in determining whether the representation is adequate. To get to the analytical framework, the courts must return to Rule 24(a)(2) as written and, by doing so, protect the three main purposes behind the Rule: protecting interests of non-parties, furthering the court's truthseeking function, and maintaining judicial economy. Then, the courts should abandon the parens patriae presumption as it obscures the final step of applying the analytical framework to define and compare the interests of the parties in or-

230. *Id.* at 246.

der to apply the correct standard for judging adequate representation.

A. *Returning to Rule 24(a)(2) As Written*

As a result of its creation, amendments, and interpretation, Rule 24(a)(2) serves three primary functions that should be incorporated into the framework of intervention analysis.[231] The first function is to protect the interests of non-parties.[232] Under the first two sections of the rule, an intervenor must show that it has an interest that could be impaired by the resolution of the suit.[233]

To arrive at whether representation is adequate, the intervenor has already demonstrated a need to be a party to the action. If the existing governmental party is adequately protecting the demonstrated interests of the intervenor, then the first function is fulfilled. This protective function encompasses more than just a shared interest. If the intervenor has interests that are subsidiary to the primary issue before the court, yet the disposition will affect them, the interests must still be protected.[234]

The second function of Rule 24(a)(2) is to further the court's truthseeking.[235] The court should try all the legal and factual issues in the suit. If an interest is presented that fulfills the first two requirements of Rule 24, and is not subsumed into interests already represented, it should be represented.[236]

Finally, the third essential function of Rule 24(a)(2) is judicial economy.[237] All issues that are part of an action should be disposed of in a single suit. Even if the intervenor is expanding the scope of litigation in a particular suit, judicial economy is not necessarily compromised by intervention.[238] Again, if the intervenor has shown a valid interest, which could be impaired by the resolution, the court should grant intervention as of right absent valid grounds for exclusion.[239]

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231. Jenkins, *supra* note 38, at 277.
232. *Id.*
233. FED. R. CIV. P. 24(a)(2).
234. Jenkins, *supra* note 38, at 276-77.
235. *Id.* at 277.
236. *Id.* at 278 (discussing how Rule 24(a)(2) works with Rule 19, or the joinder of necessary parties, to keep the process from suffering when relevant concerns are not represented).
237. *Id.* at 277.
238. *Id.* at 279 (excepting when participation would just duplicate the interests of existing parties and therefore add nothing to the truthseeking function).
239. *Id.*

B. *Abandoning the Parens Patriae Presumption*

The analysis also examines the validity of the presumption that the government is adequately representing an intervening private party, which is the root of the circuit split.[240] Arguably, the presumption represents circular logic. In light of the intent of Rule 24(a)(2), the critical issue is whether the government adequately represents the same interests as the intervenor. Yet, by relying upon the parens patriae doctrine, the court does not really examine the intervenor's interest; it presumes that the government's representation is adequate simply because it is the government.[241] If the courts use a standard that incorporates all the circumstances of a case,[242] taking into consideration the Rule 24(a)(2) requirement to prove the adequacy of representation to facilitate intervention,[243] this presumption is neither required nor helpful.

The parens patriae doctrine that some circuits have used to create the higher standard[244] does not require a de facto acceptance of adequate representation. The parens patriae doctrine pertains to whether the government is acting in its sovereign capacity, i.e., protecting a matter of public welfare and representing the public in general. If the government is not acting in its sovereign capacity, the doctrine is not applicable and there would be no presumption of adequate representation.[245] However, parens patriae is at odds with the nature of the difference in interests; for the government to represent both the public interest in a statute and the private inter-

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240. See *supra* notes 60-81 and accompanying text for a discussion of the early development of the parens patriae doctrine in this context.

241. *See, e.g.*, Cloverland-Green Spring Dairies v. Pa. Milk Mktg. Bd., 138 F. Supp. 2d 593, 601 (M.D.Pa. 2001) (describing an example of the presumption where the intervenor's interests are not identical to the government's but they overlap, yet there is no further examination of where the interests may diverge).

242. *See* Ruthardt v. United States, 164 F. Supp. 2d 232, 245 (D. Mass. 2001) (emphasizing that the four elements of Rule 24(a)(2) should be read together and in keeping with a "commonsense view of the overall litigation") (quoting Public Serv. Co. v. Patch, 136 F.3d 197, 204 (1st Cir. 1998)).

243. *See supra* Part III.A.

244. Jenkins, *supra* note 38, at 300 ("Courts that apply the presumption typically rely on the doctrine of 'parens patriae.'").

245. *See* Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996) (emphasizing that the parens patriae doctrine does not apply in every case where the government is a party because the interest may not be a matter of sovereign interest; therefore, there would be no reason to think that the government would represent it); Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 1000-01 (8th Cir. 1993) (holding that the intervenor was not asserting a matter involving sovereign interest because its narrower interest in the land was not subsumed into the general public interest that the government was charged with representing).

est of those it regulates is indeed an impossible task.[246] The presumption allows the courts to only loosely examine the circumstances of the cases to determine the capacity in which the government is operating.[247] Yet, this examination is vital to full adjudication of all potential issues.

There is a distinction between the "quasi-sovereign" interests of the state that fall under parens patriae and the narrower interests of individuals that do not come within the doctrine.[248] A government entity's "quasi-sovereign" interests include, but are not limited to, interests in the health and welfare, both physical and economic, of its citizens.[249] Since governments must represent all their citizens equally, they may have to compromise or change positions in a manner that does not benefit the individual concerns of the intervenor.[250] Thus, if the intervenor asserts an interest that is private or identifiably distinct from the general public interest, Rule 24(a)(2) and *Trbovich* indicate that intervention should be allowed with a minimal burden.[251]

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246. Nat'l Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381, 383 (10th Cir. 1977) ("Other cases have recognized the inadequacy of governmental representation of the interests of private parties."); *see, e.g.* Cabot LNG Corp. v. Puerto Rico Elec. Power Auth., 162 F.R.D. 427, 431 (D. Puerto Rico 1995) ("[existing party] is a government agency and therefore, cannot adequately represent private interests in litigation").

247. *See* Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560, 566-67 (1st Cir. 1999) ("But, perhaps as a counterweight to the broad reading of 'interest,' the courts have been quite ready to presume that a government defendant will 'adequately represent' the interests of all private defenders of the statute or regulation unless there is a showing to the contrary.").

248. Jenkins, *supra* note 38, at 300.

249. *Id.* at 301.

250. *Id.* at 303. "Public entities are also susceptible to agency capture and ideological bias . . . . A presumption of adequate representation by government ignores those realities or, at least, improperly adds to the burden already facing applicants in those circumstances." *Id.* at 303 n.210; *see also* Chiglo v. City of Preston, 104 F.3d 185, 188 (8th Cir. 1997) (stating that when a citizen's interests are different from the public's at large, the parens patriae should not be expected to represent them); Sierra Club v. Espy, 18 F.3d 1202, 1207-08 (5th Cir. 1994) (discussing how the government must represent the broad public interest, from which the economic concerns of the timber industry are distinguishable); Dimond v. Dist. of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986) (describing the inadequacy of government representation of private parties because of its duty to represent the general public interest); United States v. Hooker Chem. & Plastics Corp., 101 F.R.D. 451, 457 n.5 (W.D.N.Y. 1984), *aff'd* 749 F.2d 968 (2d Cir. 1984) (stating that courts often depart from the parens patriae doctrine when the suit involves a challenge to government regulations and private entities benefiting from the regulations are seeking to intervene as defendants).

251. Jenkins, *supra* note 38, at 303 (indicating that Rule 24(a)(2)'s requirement of a separate and distinct interest in the subject matter fulfills the burden that the intervenor's interests are independent from the general public interest pursued by the government as parens patriae).

The circuit split, and resulting spectrum of standards and application of this aspect of Rule 24, is in part due to the linear history of the case law. In this line of cases, the issue of adequate representation arises in two different circumstances where the government is involved.[252] Several of the cases were based on public law, in which the government acted to protect the public good, such as the environment or resource rights.[253] The courts considered the parens patriae doctrine in the context of whether the government was acting in its sovereign capacity and whether the intervenor had an interest subsumed in the public interest, as when an intervenor's rights to use public land are indistinguishable from the rest of the state's citizens.

Then, later decisions borrowed the presumption from these cases and applied it to circumstances in which the government was protecting a law as a defendant and the intervenor was within the industry regulated by that law.[254] While the government is still acting to uphold a law designed to protect some aspect of public welfare, the government's relationship with the intervenor is one of regulation rather than general protection. The distinction is important since the line of case law and its reasoning is intermingled. Yet, the regulatory circumstance presents a more sharply distinguishable, usually economic, interest that is in danger of being ignored as a result of the presumption borrowed from public lawsuits.

When the court uses a presumption of adequate interest, where the governmental entity is the regulator of the intervenor, the presumption goes beyond the intent of Rule 24(a)(2).[255] In addition, the courts adopting the presumption of a higher standard involving

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252. See *supra* Part I, II for the history of cases in this line.

253. *See* Kleissler v. U.S. Forest Serv., 157 F.3d 964, 972 (3d Cir. 1998) ("A government entity charged by law with representing a national policy is presumed adequate for the task, particularly when the concerns of the proposed intervenor, e.g., a 'public interest' group, closely parallel those of the public agency.") (citation omitted); Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996) ("But when one of the parties is an arm or agency of the government, and the case concerns a matter of 'sovereign interest,' the bar is raised . . . ."); Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 1000, 1001 (8th Cir. 1993) (using language describing the government presumption to protect management of game and fish under state law).

254. Cloverland-Green Spring Dairies v. Pa. Milk Mktg. Bd., 138 F. Supp. 2d 593, 601 (Pa. M.D. 2001) (citing *Kleissler*, 157 F.3d at 972); Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560, 566 (1st Cir. 1999) (citing Pub. Serv. Co. v. Patch, 136 F.3d 197, 207 (1st Cir. 1998) (citing *Mausolf*, 85 F.3d at 1303).

255. Jenkins, *supra* note 38, at 298-99 ("It defies reason to conclude that [*Trbovich*'s] rationale would countenance a heightened adequacy standard for suits involving government.").

government entities do not fully explain where they derived the presumption from, despite the fact that *Trbovich* was a decision regarding representation by a governmental entity.[256] The presumption appears to have derived from cases in which the government was representing environmental laws—protecting the "commons"—applicable to regulated industries. The government's representation of the public's interests is more likely to conflict with private interests in circumstances where a group of citizens challenge the validity of laws or regulations, and the citizens benefiting from the laws attempt to intervene to assert their own individual interests.[257]

Presuming adequate representation to create a higher standard when the government is involved conflicts with the fundamental concepts of Rule 24(a)(2).[258] Specifically, using the doctrine to create a higher standard shifts the focus away from the essential question. That question is not whether the government is one of the parties, but whether the interests of the existing governmental party and the intervenor are the same.

On the other hand, allowing liberal intervention, unless clearly redundant, is in keeping with Rule 24(a)(2), the Supreme Court decision in *Trbovich*, and many federal circuit courts' holdings.[259] The proposed analytical framework also incorporates the policy that the intervenor is the best judge of whether its interests are being adequately represented.[260] When a regulating governmental agency is presumed to be adequately representing those it regulates, not only is the intervenor's interest potentially infringed upon, its voice is effectively silenced, save for the possibility of amicus status and its restricted contributions.[261] Since the court has only limited means to ascertain whether the interest is distinct, unprotected, and should be heard before intervention is allowed, the fact that the intervenor felt it necessary to participate in the suit should speak

256. *Id.* at 299 (discussing the decision in Hopwood v. Texas, 21 F.3d 603, 605 (5th Cir. 1994), where the court cited that the burden is minimal but higher when the representation is by the government without indicating why that should be so).

257. *Id.* at 314; MOORE, *supra* note 178, at 24-48.

258. See *supra* Part I.A; *infra* Part III.B.2 for a discussion of what Rule 24(a)(2) is supposed to accomplish and its core concepts.

259. *See supra* notes 23-35 and accompanying text.

260. Kennedy, *supra* note 21, at 354 (explaining that the applicant for intervention is the best judge of whether the representation is adequate).

261. The other two criteria for Rule 24(a)(2) involve the intervenor having an interest that is being impeded. To deny intervention through the parens patriae concept is to leave the intervenor with an impeded interest that may or may not be defended.

for itself.[262]

Upon examination, abandoning the presumption and employing an analysis of the distinct circumstances and interests in each case is clearly necessary. The government could uphold a challenged law regulating the intervenor but have an interest that diverges from that of the intervenor.[263] Conversely, the government and the intervenor could have closely aligned economic interests, making a simple difference in tactics insufficient to require separate representation.[264] As several cases have illustrated, the government could be charged with representing a much broader interest than the narrower, more economic interest of the intervenor, a task some courts have deemed an "impossible task" on its face.[265] The courts should keep this difference in sharp focus and protect it from getting brushed aside in determining whether the government is acting in a sovereign capacity. The courts cannot use a presumption that the government is adequately representing the interests of the intervenor without hampering intervention as it was designed to work.

Absent the presumption, the courts must clearly identify and examine the interests. The degree to which the interests overlap or contradict one another is key to whether to allow intervention.

C. *The Analytical Framework*

The proposed analytical framework simplifies the process that the courts use to determine adequate representation when the gov-

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262. *See* Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972) (stating that showing required for inadequate representation should be minimal); WRIGHT, *supra* note 19 (recalling the argument, albeit unadopted, during the amending of Rule 24 that the intervenor should always be allowed to intervene if he or she was willing to participate and pay for the expense); Shapiro, *supra* note 31, at 748 (advocating that the court should give due fairness to hearing the intervenor on a matter important to him or her, and on the contribution he or she could make to the court's understanding of the issue).

263. *See* Linton v. Comm'r of Health & Env't, 973 F.2d 1311, 1319-20 (6th Cir. 1992) (regulating the industry and trying to uphold the law, but since the government has an economic interest in the intervenors as well, the interests are inherently inconsistent); *see also* Kleissler v. U.S. Forest Serv., 157 F.3d 964, 972 (3d Cir. 1998); Mausolf v. Babbitt, 85 F.3d 1295, 1303-04 (8th Cir. 1996).

264. *See* Maine v. U.S. Fish & Wildlife Serv., 262 F.3d 13, 19 (1st Cir. 2001) ("[D]ifference in tactics . . . does not necessarily an inadequacy make."); Daggett v. Comm'n on Gov't Ethics and Election Practices, 172 F.3d 104, 112 (1st Cir. 1999) (difference in tactics not enough).

265. *See, e.g.,* Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1265 (10th Cir. 2001) (citing Nat'l Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381 (10th Cir. 1977)).

ernment is already a party and an entity it regulates is trying to intervene. First, the intervenor must define its individual interest for the court as distinct from the general interest the government is representing. Second, the court should determine the differences between these interests in order to apply the appropriate standard for showing whether the existing representation is adequate. Specifically, the court should decide whether the interests are adverse or not encompassed at all, identical, or just similar. Finally, if intervention is inappropriate, the court should consider alternatives to intervention to hear the proposed intervenor's voice in the proceedings.

1. Defining the Interest

The nature of the interest is the starting point of any analysis of intervention.[266] The court must ascertain the interests of both parties and examine such interests to determine whether they differ. Fortunately, Rule 24(a)(2) already requires a definition of the interest before proceeding to the adequate representation requirement.[267] Preliminarily, the intervening parties must show that they have an interest in the proceedings that rises to the level of being directly affected by the disposition.[268]

Further, the court must understand the government's represented interest in order to make a comparison. The party that needs to define this interest for the court depends on whether or not there has been a burden shift pursuant to the amendments to Rule 24(a)(2).[269] If there has been a burden shift, then after the intervenor has fulfilled the first two requirements of Rule 24(a)(2), the government is responsible for demonstrating that the represented interest already encompasses the intervenor's interest, and that the government can adequately represent both. If the burden

266. WRIGHT, *supra* note 19, at 318 ("The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present parties.") (footnote omitted).

267. FED. R. CIV. P. 24(a)(2).

268. *Id.*

269. *See* Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967) (describing the shift in wording after the 1966 amendment of Rule 24 as not changing the standard for intervention, but underscoring "the burden is on those opposing intervention to show the adequacy of the existing representation" and making it more liberal); WRIGHT, *supra* note 19, at 314 (describing the change in wording of Rule 24 after the 1966 amendment as clearly shifting the burden of persuasion to allow in the intervenor unless the court is persuaded that representation is adequate); Shapiro, *supra* note 31, at 729. *But see* Kennedy, *supra* note 21, at 353-54.

remains on the intervenor to show that it should be let in only if the existing representation may be inadequate, then the intervenor must define the governmental interest to show that its interest is distinct from the government's interest such that the government cannot adequately represent both.

The courts have presented valid arguments that the 1966 amendments to Rule 24 incorporated a burden shift.[270] Factors that contribute to these arguments are the change in wording, the relationship between Rule 24 and Rules 19[271] and 23,[272] the general liberalization of Rule 24, and a practical consideration of who could best bear the burden.[273] Although most courts have not adopted a shift in burden,[274] these factors have merit if the framework is more closely aligned with the intent of Rule 24(a)(2). Given these considerations, and with a shift in burdens depending on how the interests relate, the burden should remain on the intervenor except where the intervenor has demonstrated a different interest. Since intervention should be liberally allowed, and the intervenor is the best judge of whether the government is adequately representing its interest,[275] the government must prove that it is *in fact* an adequate representative in cases where adversity is shown initially.

2. Differences Between Interests

In order to employ a clear analysis, the intervenor's and the government's interests can be grouped into three categories with different standards applying to each category. The interests can be adverse or not represented at all, identical, or similar but not the same.[276]

If the interests are adverse, or not represented at all, the representation is clearly inadequate and the court should apply the most minimal burden.[277] If they are identical, then the court should require a compelling showing to prove inadequate representation because this category is the most likely to be adequately represented.[278] Lastly, if the interests are similar but differ in sig-

270. 26 FED. PROC. § 59:300, at 226 (1984).
271. FED. R. CIV. P. 19 (Joinder of Persons Needed for Just Adjudication).
272. FED. R. CIV. P. 23 (Class Actions).
273. 26 FED. PROC. § 59:300 (1984).
274. Blake v. Pallan, 554 F.2d 947, 954 (9th Cir. 1977) (stating that burden shift has not been adopted by most courts).
275. 26 FED. PROC. § 59:300 (1984).
276. 26 FED. PROC. § 59:303, at 228 (1999).
277. *Id.*
278. WRIGHT, *supra* note 19, at 318-19.

nificant ways, the court should make a discriminating judgment on the facts using a minimal burden; the court should allow intervention unless the existing party is clearly providing adequate representation.[279]

a. Adverse Interests

If the intervenor has an interest adverse to the interests the government represents, or does not represent at all, the court should allow intervention after a minimal showing. Because the standard is lowered in these circumstances, the interest would have to rise to the level of actual adversity or proven failure to represent the existing interests. Although not an exclusive list,[280] the three-point test devised by Justice (then Judge) Blackmun provides a useful framework for analyzing whether the interests are, in fact, adverse.[281] According to the three-point test, adversity of interest, collusion with an opposing party, or nonfeasance by the existing governmental party would allow a virtually per se intervention.[282] Because intervention would be virtually per se, the burden would shift to the government to prove that its representation was in fact adequate.

b. Identical Interests

If the interests are identical, the court should allow intervention only if there is a strong showing of inadequate representation.[283] It would be adverse to Rule 24(a)(2) to allow intervention when the interest is truly adequately represented; if the interests are indeed identical, then the government would be adequately representing the proposed intervenor. Otherwise, the intervening parties would have little to offer and could obstruct the proceedings. Since the underlying objective of the suit is generally a matter of public concern, the differences cannot be superficial because that would overload the courts and hinder judicial administration. Differences in interest and scope should be treated with the minimal

279. *Id.*

280. Daggett v. Comm'n on Governmental Ethics & Election Practices, 172 F.3d 104, 111 (1st Cir. 1999).

281. *Id.*; Moosehead Sanitary Dist. v. S.G. Phillips Corp., 610 F.2d 49, 54 (1st Cir. 1979).

282. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 155-56 (1967) (Stewart, J., dissenting); Stadin v. Union Elec. Co., 309 F.2d 912, 919 (8th Cir. 1962).

283. 26 FED. PROC. § 59:303 (1984).

burden to give the intervenors the right to defend their own interests and add to the overall knowledge and understanding of the court, but the intervenor has the burden to prove inadequate representation.

c. Similar Interests

Regulated parties trying to intervene with their regulators are doing so in an area that falls between private and public law. Public law concerns subject matter that is about public policy, not "between private individuals about private rights."[284] Yet, the intervenor is often asserting a private right in a suit about enforcement of statutes or regulations. The government's representation of the public interest could be in sharp contrast, yet not necessarily adverse, to the private interests of the regulated party seeking to intervene.[285] Therefore, the court should examine intervenor's interests to determine where they diverge from the public interest, not where they overlap. On the other hand, the intervenor's interest is sometimes not a private interest at all, but rather a public one pursued by a private entity.[286] If there is unity of purpose, the intervenor has to show that it will contribute meaningfully to the suit and would otherwise be left without representation for its particular interest with a tangible or predictable showing.[287]

When a government agency is charged with representing a public interest, into which the intervenor falls, but the intervenor is claiming an interest different from the public interest, representation may be inadequate despite an overall similarity in interests. If a regulated organization is trying to intervene, its interest is often trying to uphold or strengthen a statute that is being challenged by those affected. The agency is charged with upholding the statute and is likely to do so vigorously. Therefore, the interests appear very similar at the outset. When interests are similar, "a discrimi-

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284. Jenkins, *supra* note 38, at 274-75 (quoting from Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976)).

285. *Id.* at 314 (specifying that this is often the case "when one group of citizens sues the government challenging . . . laws or regulations and [those] who benefit from [the] laws or regulations wish to intervene and assert their own, particular interests rather than the general, public good").

286. *See* United Nuclear Corp. v. Cannon, 696 F.2d 141, 144 (1st Cir. 1982) (ruling that the government entity and the intervenor have the same ultimate goal of upholding the statute, despite the intervenor having a more specialized interest due to environmental concerns, so the intervenor is essentially asserting a public, rather than private interest).

287. Ruthardt v. United States, 164 F. Supp. 2d 232, 245 (D. Mass. 2001).

nating judgment is required based on the circumstances of the particular case, but [intervention] . . . should be allowed . . . unless it is clear that the party will provide adequate representation for the absentee."[288] The key is to pinpoint exactly where the interests diverge, not where they overlap, and to keep from undervaluing that difference.[289] The circuits have found various rationales for discussing the manner in which the interests are different.

The interests, albeit similar, may differ in scope. This means that the interests may not coincide enough to show adequate representation.[290] Differences in scope can occur when the government has a broad public interest in enforcing a statute and the intervenor has an interest in how upholding the statute affects its particular industry[291] or the private interests of individuals within the intervening organization.[292] Characterizing the interests as different in scope focuses attention on the "impossible task" that the government has in representing both the general public good and the narrower economic interests of the intervenor.

Some courts have chosen instead to classify the private interests of individuals or organizations as inherently different, rather than just narrower in scope. The interests can differ even when the ultimate objective is the same. For example, if an environmental group or landowner is seeking to intervene in an action brought against the government to challenge an environmental statute, the government is charged with representing all of the public, industry included. Within the goal of defending the statute, the intervenor's interest is not just narrower in scope, it differs from the government's because the group may advocate a higher standard of control, a different level of compromise, or even a different focus on

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288. WRIGHT, *supra* note 19, at § 1909; 26 FED. PROC. L.ED. PARTIES § 59:303; Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993) ("Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action.").

289. Jenkins, *supra* note 38, at 304-05 (allowing intervention under Rule 24(a)(2) only requires a minimum burden and that burden is overcome where the intervenor's "interests diverge from, or conflict with, those of the movant.").

290. *See* Natural Res. Def. Council v. Costle, 561 F.2d 904, 912 (D.C. Cir. 1977) (stating that different scopes of interest can warrant intervention, particularly when the intervenor can provide a helpful supplement to the defense because of its more specific, technical knowledge).

291. *Id.*

292. Conservation Law Found. v. Mosbacher, 966 F.2d 39, 44 (1st Cir. 1992) (illustrating the economic interests of fishermen within the commercial fishing organization trying to intervene).

what aspect of the statute is essential to protect.[293] The intervenor wants something different than the government, not just to represent a narrower part of an overall objective. However, the intervenor cannot just disagree on legal strategy.[294] If the intervenor's interests are subsumed in the public interest and are covered by the government's representation, the interests could be difficult to distinguish from each other.

In the area of law where the governmental entity directly regulates private businesses or organizations,[295] the interest of the intervenor is perhaps more easily distinguishable from that of the government.[296] The government entity is charged with representing broad public interests; the intervenors have a narrower, often primarily economic, interest.[297] Again, the determination of whether the interests diverge sufficiently to require separate representation hinges on the type of interest.[298]

If the interests are similar, in that the differences primarily lie in legal strategy,[299] facts, or undefined future conflicts,[300] then the

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293. *See* Sierra Club v. Glickman, 82 F.3d 106, 109 (5th Cir. 1996) (finding inadequate representation because the interests of the intervenor may not coincide, even if they are in common at the time, and the state has an independent interest in maintaining and allocating natural resources); Mausolf v. Babbitt, 85 F.3d 1295, 1304 (8th Cir. 1996) ("Government's interest in promoting recreational activity and tourism in the Park, an interest many citizens share, may be adverse to the Association's conservation interests, interests also shared by many."); *cf.* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 101 F.3d 503, 508 (7th Cir. 1996) ("More is needed than a presumption of inadequacy based on the diversity of the Department's interests. . . .").

294. Jenkins, *supra* note 38, at 305.

295. *See generally* Linton v. Comm'r of Health & Env't, 973 F.2d 1311, 1319-20 (6th Cir. 1992) (defining interests of state as both regulator and purchaser of intervenor's services).

296. *See* Dimond v. Dist. of Columbia, 792 F.2d 179, 192-93 (D.C. Cir. 1986) (determining that a private corporate entity has a more narrow, parochial, financial interest not shared by the public because it would be economically affected if the court's decision is retroactive and the state would not).

297. *See* Shapiro, *supra* note 31, at 737 (seeking intervention when a private person has no independent legal claim but has an identifiable interest, usually economic, that differentiates him or her from the general public); Jenkins, *supra* note 38, at 298.

298. *See* Blake v. Pallan, 554 F.2d 947, 955 (9th Cir. 1977) (describing a test for demonstrating different interests sufficient to show inadequate representation as: 1) are the interests of the intervenor similar enough to the party that the legal arguments would be the same; 2) is the existing party willing and capable of making those arguments; and 3) if allowed to intervene, would the intervenor add a necessary element not currently covered).

299. *See* Jenkins, *supra* note 38, at 305-06 (demonstrating inadequate representation may require more than disagreement in tactics, but the minimal requirement is satisfied when the interests diverge or conflict).

300. *Compare* Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 1000-01 (8th Cir. 1993) (finding the future potential for conflict enough to satisfy bur-

court must determine if the differences are real or negligible.[301] Intervention can sacrifice judicial expediency and economy; indeed, the court and the original parties pay the costs. Both, therefore, have an interest in protecting the integrity of the original suit.[302] If the intervenor's interests are fundamentally different, such as economic, the court should allow intervention. If they are negligibly different, they may be subsumed into the public interest that the government represents. Because the interests are different, or diverge in some way, the court should allow intervention once the intervenor has shown a tangible difference in interest that is not represented.

Therefore, the intervenors must present their interests with the differences clarified for the court. The court should determine the nature of the differences and whether they are real. The court should then apply either a minimal burden for different interests, a higher burden for subsumed interests, or a per se standard for directly adverse or non-existent representation with a burden shift to the existing party to show adequate representation. If the court determines that the differences exist but are slight and are primarily part of the public interest, or that they are similar and the minimal burden is not overcome, it can employ alternatives to intervention. The alternatives allow the proposed intervenor to present the interest without intervening.

D. *Alternatives to Intervention*

The courts can include an intervenor's views without allowing intervention as of right as full parties. The Advisory Committee for the Federal Rules of Civil Procedure intended the court to modify intervention as of right under Rule 24(a)(2) as necessary without

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den of inadequate representation) *with* Pub. Serv. Co. v. Patch, 136 F.3d 197, 208 (1st Cir. 1998) (refusing to infer inadequate representation from unproven potential for future conflict).

301. Kennedy, *supra* note 21, at 377 (listing factors to consider for court's decision on whether to allow intervention, including effectiveness of remedies if intervention is denied, nature of interest, impact on jurisdiction if allowed, and impact on administration of justice if allowed).

302. Many of the early cases under the original Rule 24 were anti-trust cases appealed directly to the Supreme Court under the Expediting Act, and the Supreme Court was less receptive to non-government parties getting involved in the actions for reasons of judicial efficiency. Peter A. Appel, *Intervention in Public Law Litigation; The Environmental Paradigm*, 78 WASH. U.L.Q. 215, 248 (2000). Also, in the government-initiated antitrust suits, the Court held that intervention by private parties was inappropriate because it "would entail questioning the wisdom of the government's policy decisions." *Id.* at 252.

expressing exactly how or in what circumstances.[303] For example, the court can limit the intervenor's ability to present witnesses or restrict its discovery rights.[304] If the court denies intervention as of right but allows permissive intervention, the intervenors are still parties, even if the order limits their participation, and they can appeal a final judgment.[305] Even if the intervenors are allowed in to present their views on the consent decree, the original parties can leave them out of settlement negotiations.[306]

If the court decides that the interests are different but not specialized or distinct enough to warrant intervention, it could also allow the intervenor to participate in some capacity as amicus curiae.[307] While this fulfills part of the intervenor's purpose in having its voice heard, the concern remains that the interest is not adequately protected. Amicus curiae is a common law concept that allows the proposed intervenor to assert interests when an entity is unable to participate as a party in a lawsuit, such as when intervention has been denied.[308] The court can allow different kinds of amicus and "levels" of participation in much the same way as intervention.[309] When the intervenor is a private party, for example, the court can limit its role to providing information, raising issues potentially overlooked by the parties, filling in factual information, and raising possible implications of the court's decision.[310]

Historically, an amicus curiae is a party who is allowed into the court to provide impartial information on the law if there is doubt

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303. Appel, *supra* note 302, at 278 ("[C]ourt had the discretion to limit its grant of intervention . . . the committee provided no authority for this reference. Nevertheless, more and more courts have granted limited forms of intervention in which the intervenor is not permitted to present witnesses or is limited in its discovery rights."); *see also* United States v. Reserve Mining Co., 56 F.R.D. 408, 420 (D. Minn. 1972) (granting limited form of intervention for multiple intervening parties).

304. Appel, *supra* note 302, at 278 ("[I]f a district court grants a limited form of intervention, the intervenor cannot appeal that decision until final judgment in the case.").

305. Stringfellow v. Concerned Neighbors in Action, 480, U.S. 370, 375-76 (1987) (stating that intervenors either of right or permissive have the right to appeal an adverse final judgment by a trial court so it can challenge the intervention of right denial and the limitations put on permissive intervention at the appeals court after the trial).

306. Appel, *supra* note 302, at 278-79 (excluding the intervenors because an intervenor cannot block the settlement or consent decree by withholding its consent).

307. Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U.L. REV. 1243, 1258 (Summer 1992).

308. *Id.* at 1291.

309. *Id.* at 1258-59.

310. *Id.* at 1258-60.

about it, particularly in public litigation.[311] It was not an adversarial party in the suit, but some courts have moved away from the impartial informational purpose and granted limited adversarial powers to the amici.[312] Amicus curiae are never full parties, however, and are usually barred from starting legal proceedings, filing pleadings, or controlling the adversarial side of the controversy.[313] In order to qualify as parties, the court would have to grant intervention under Rule 24; the two statuses should not be confused.[314]

Regardless of its flexibility, amicus curiae should be used only when the court is certain that the interests do not differ materially enough to warrant intervention but are not subsumed in the overall objective. The court should not grant amicus status as a means of allowing partial intervention when the court is not clear whether the representation is adequate and there appears to be a difference in interests. Further, the court should not grant amicus status to allow regulated intervenors to inform the court of a different interest under parens patriae while denying actual intervention. The court, using the minimal burden and the policy that the intervenor is the best judge of adequate representation, should determine whether intervention is appropriate before considering amicus curiae.[315]

CONCLUSION

The courts must navigate the bewildering array of tests, analytical frameworks, and standards they have developed when deciding motions for intervention. To aid in navigating, courts should return to the fundamental questions being asked when a party is seeking to intervene with the government that regulates it or its interests. The court should identify the interests of the parties and ascertain whether they diverge. Unless the interests are identical or subsumed, courts should employ a minimal burden of showing when representation is inadequate. In cases where the court cannot de-

311. United States v. Michigan, 940 F.2d 143, 164 (6th Cir. 1991).

312. *Id.* at 165.

313. *Id.*

314. *Id.* ("The intent and purpose of the Federal Rules should not be evaded by acts of judicial legerdemain.").

315. The line between amicus curiae and intervenor is not always a clear one, and the courts should use both appropriately since they entail different rights and privileges. *See* Lowman, *supra* note 307, at 1255-56; *see also* Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 INT'L & COMP. L.Q. 1017, 1018 (1967) (asserting that elevating amici to a more party-like status by granting them more powers blurs the line between amici and intervenor).

termine the differences, and the court decides that the intervenor has information to contribute, amicus curiae can provide a voice for the interest. The doctrine of parens patriae should only apply in circumstances where the state is truly acting in its sovereign capacity. Ultimately, the history of Rule 24(a)(2) and decisions involving it support a more liberal approach to intervention rather than a more restrictive one.

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